asking questions. He must have believed that no harm would befall his widowed mother. The fact that the cheques issued by PT, drawn on a Kuala Lumpur bank, were all dishonoured, so soon after credit facilities were granted by the defendant, reinforces my belief that the son, in all his youthfulness, was probably taken in by unscrupulous associates or so-called friends.

For the reasons which I have given above I also find that Mdm Wee did not explain the mortgage deed sentence by sentence to the plaintiff in Hokkien. Mdm Wee could have explained generally the effect of the mortgage deed to the son in English and I think she did. But the son deceitfully did not correctly interpret it to the mother.

Accordingly, in my judgment, this is a case where the plea of non est factum applies. The plaintiff never intended to part with the title deeds for the purpose of mortgaging her property as security for the credit facilities to be granted by the defendant to PT. She did not intend to execute a legal mortgage on 8 October 1981. The plaintiff is therefore entitled to the reliefs she claims, with costs.

I think this case highlights once again the need for extra care on the part of solicitors in dealing with elderly and/or illiterate persons (or others under disability), particularly when such persons are assuming responsibilities or liabilities of others. It is vitally important to ensure that such a person fully understands what he is about to do and that there is no undue influence or deception. Only a disinterested person should be asked to be an interpreter. And where a solicitor is acting for all parties in a transaction he must be ever so conscious of a conflict situation arising and should not hesitate, wherever there is a reasonable doubt, to ask the person to seek independent legal advice.

Claim allowed.

Solicitors: *Yap & Yap; Joseph Hoo Morris & Kumar.*

Reported by *Teoh Ai Lin*

Hew Tze Yin & Anor v Ming Teck Co Pte Ltd

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NO 1149 OF 1989
KARTHIGESU JC
12 OCTOBER 1990

Land Law — Agreement for sale and purchase of flat — Notice to complete given by vendor after agreed date in sale and purchase agreement — Shortfall in area of flat — Protracted negotiation between parties — Sale and purchase of flat not completed — Whether vendor in breach by reason of failure to give valid notice to complete or shortfall in area of flat — Whether purchaser obliged to complete

The defendants were developers of a condominium of flats. The defendants entered into an agreement ('the agreement') to sell a flat ('the flat') to the plaintiffs some time in September 1981. Under cl 14(2) of the agreement notice of intention to complete was to be given by the vendor on or before 31 December 1986. By a notice in writing dated 7 August 1987 addressed to the plaintiffs' solicitors, the defendants' solicitors called on the plaintiffs to complete the purchase of the flat by paying the balance of the purchase price.

The plaintiffs' solicitors replied that (i) as the defendants' notice to complete was given after 31 December 1986, liquidated damages for late completion was payable; and (ii) a deduction in purchase price would be made for the 4.8% shortfall in the area of the flat. There followed an exchange of correspondence between the parties' solicitors. The plaintiffs did not complete.

In August 1989, the plaintiffs entered into an agreement to sell the flat to a third party and requested the defendants to execute a transfer in favour of the plaintiffs' sub-purchaser. The defendants' solicitors replied that the defendant had no objections to such tripartite transfer. Thereafter there was a further exchange of correspondence between the parties' solicitors regarding the shortfall in the area of the flat. On 25 November 1989, the defendants' solicitors wrote to the plaintiffs' solicitors stating that the defendants required completion and denying that the shortfall in area of the flat was actionable. Notwithstanding the defendants' solicitors' letter dated 25 November 1989, the defendants did not act under the terms of the agreement to repudiate the agreement nor did the plaintiffs act to rescind the agreement on account of the shortfall in area.

The plaintiffs commenced proceedings on 25 November 1989, claiming that the defendants were in breach of the agreement, on account of the shortfall in area and the late completion.

Held, dismissing the plaintiffs' claim:

(1) Under the agreement, the last date for notice to complete to be given was 31 December 1986. The irresistible inference on the facts is that no application had been made by the defendants to the Controller of Housing for an extension of time for completion. The defendants' solicitors had given a valid notice to complete by virtue of their letter dated 7 August 1987, and there was no requirement under the agreement that the notice to complete must contain a completion account nor was it a fundamental conveyancing practice that a purchaser be entitled to a completion account as of right. There was no doubt that the plaintiffs were entitled to liquidated damages under the agreement for the late completion.

(2) The plaintiffs' proper course of action was to have completed the transaction on 22 August 1987 by deducting from the balance of the purchase price the sum representing the interest for late completion.

(3) As regards the plaintiffs' claim for the shortfall in area, the plaintiffs should have completed the purchase with a qualification of their entitlement to claim for the shortfall in area, or made an application under s 4 of the Conveyancing and Law of Property Act to determine the matter or rescind the agreement. Whether or not a shortfall in area is substantial is to be decided on its facts and no rule of thumb could be applied. In this case, a shortfall in area calculated on a unit ratio and which produces a difference of $14,815.68 is not an inconsiderable sum of money to the average flat dweller.

Cases referred to

1 *Toh Teck Sun* v *Mandarin Gardens Pte Ltd* [1988] 2 MLJ 276 (folld)
2 *Yeo Brothers Co (Pte) Ltd* v *Atlas Properties (Pte) Ltd* [1988] 1 MLJ 150 (folld)
3 *Chong Ah Kwee & Anor* v *Viva Realty Pte Ltd* [1990] 2 MLJ 389 (folld)

Legislation referred to

Conveyancing and Law of Property Act (Cap 61, 1985 Ed) s 4

Keh Kee Guan (*Anthony Soh* with him) for the plaintiffs.
Cheng Tim Pin (*Lo Wai Ping (Ms)* with him) for the defendants.

Cur Adv Vult

Karthigesu JC: The defendants were the developers of a condominium of flats for sale known as Braddell Park. By an agreement in writing dated 7 November 1980, the defendants agreed to sell to Wong Hon Yin and Luk Sam Mui one of the flats then being erected ('the flat') for $308,660. The said Wong Hon Yin and Luk Sam Mui by a deed of assignment dated 4 May 1981 assigned the flat and all their rights title benefits and interest of and under their agreement with the defendants dated 7 November 1980 to the plaintiffs for $308,000. As their development was subject to the Housing Developers (Control and Licensing) Act (Cap 250, 1970 Ed) the defendants in accordance with r 17 of the Housing Developers Rules 1976 as amended in 1981 entered into a fresh agreement with the plaintiffs dated 11 September 1981 for the sale of the flat to them at the original price of $308,660 ('the agreement').

The flat is described in identical terms in the respective schedules of the sale and purchase agreement dated 7 November 1980, the deed of assignment dated 4 May 1981 and the agreement as follows:

> All that flat on the Ground Floor in the building project known as Braddell Park now being erected or erected . . . estimated to contain a floor area of 125 square metres (1,342 square feet) . . . which said housing unit is provisionally known as Block 1, Type B, Ground Floor, Braddell Park, Singapore.

The agreement apart from being subject to the special conditions contained therein was also subject to the conditions of sale by public auction known as 'The (Revised) Singapore Conditions of Sale' as far as the same are applicable to a sale by private treaty and are not varied by or inconsistent with the special conditions contained in the agreement (cl 1).

The provisions of the agreement which are relevant to the issues in this matter are the following:

> Clause 1 The Vendor shall sell and the Purchaser shall purchase free from encumbrances all that estate in fee simple in part of the land comprising the flat described in the first schedule hereto . . . to be comprised in a Subsidiary Strata Certificate of Title under the provisions of the Land Titles (Strata) Act (Cap 277) . . .

The first schedule referred to in this clause has already been set out above.

> Clause 3(1)(i) The purchase price shall be paid by the Purchaser to the Vendor by the instalments and at the times following that is to say:
>
> on completion of the sale and purchase of the housing unit as provided in clause 14 hereof, the balance of thirty (30) per cent of the purchase price, twenty (20) per cent of which shall be paid forthwith to the Vendor and the remaining ten (10) per cent shall be paid to the Purchaser's solicitors as stakeholders, five (5) per cent of which shall be paid to the Vendor within seven (7) days of the receipt by the purchaser or his solicitors of the Certificate of Fitness for Occupation issued by the Assistant Director in respect of the housing unit or a photographic copy thereof duly certified as a true copy by the Vendor's solicitors and the remaining five (5) per cent or any balance thereof (after any deduction has been made in accordance with clause 18 hereof) to be paid to the Vendor on the expiry of six (6) months after the date of delivery of vacant possession to the Purchaser or the date of the issue of the Certificate of Fitness for Occupation, whichever is the earlier.
>
> Clause 5(1) If any of the instalments referred to in clause 3 hereof remains unpaid by the Purchaser at the expiration of the period of fourteen (14) days referred to in that clause, interest on any such unpaid instalment or instalments shall commence to run on the day after the expiration of such period and shall be payable by the Purchaser until
>
> (a) such time as the unpaid instalment is paid; or
> (b) the expiration of the notice to repudiate this Agreement given by the Vendor pursuant to paragraph (3) hereof
>
> whichever is the earlier.
>
> (2) The interest payable under paragraph (1) hereof shall be calculated from day to day at the rate of twelve (12) per cent per annum.

(3) If any of such unpaid instalments and interest remains unpaid for any period in excess of forty (40) days after its due date the Vendor shall be entitled at its option on giving to the Purchaser or his solicitors not less than thirty (30) days' notice in writing to treat this Agreement as having been repudiated by the Purchaser and (unless in the meanwhile such unpaid instalment and interest shall have been paid) this Agreement shall at the expiration of the said notice (and in this respect time shall be of the essence) be annulled and in such an event —

(a) the Vendor shall be entitled to deal with or otherwise dispose of the housing unit in such manner as the Vendor shall see fit as if this Agreement had not been entered into;

(b) the instalments previously paid by the Purchaser to the Vendor excluding any interest paid shall be dealt with and disposed of as follows:

(i) firstly, all interest calculated in accordance with paragraph (1) hereof owing and unpaid shall be paid to the Vendor,

(ii) secondly, a sum equal to twenty-five (25) per cent of the balance thereof shall be paid and forfeited to the Vendor; and

(iii) lastly the residue thereof shall be refunded to the Purchaser;

(c) neither party hereto shall have any further claims against the other for costs, damages, compensation or otherwise hereunder; and

(d) each party thereto shall pay its own costs in the matter.

Clause 14(1) The sale and purchase herein shall be completed at the office of the Vendor's solicitors, Messrs Yap & Yap fourteen (14) days after the receipt by the Purchaser or his solicitors of the notice to complete of the Vendor or of its solicitors such notice to be accompanied by the certificate of the Vendor's architect that the said approval of the Competent Authority for subdivision has been obtained. On completion, the Vendor shall make and execute to the Purchaser an assurance of the property sold such assurance to be prepared by and at the expense of the Purchaser.

(2) The said notice to complete shall be given by the Vendor on or before the 31st day of December 1986, or within any extension of time given by the Controller of Housing save that any extension of time given by the Controller of Housing shall not exceed six months from the date hereof. If the Vendor shall fail to give the said notice to complete on the date fixed for completion or before the expiration of any extension of time given by the Controller of Housing the Vendor shall pay to the Purchaser liquidated damages calculated from day to day commencing from the date hereof or any extended date when such notice to complete should have been given at the rate of nine (9) per cent per annum on the sum equal to eighty (80) per cent of the purchase price, such interest may be deducted from any instalment due and payable to the Vendor.

Condition 11 of The (Revised) Singapore Conditions of Sale reads as follows:

> The property is believed and shall be taken to be correctly described as to quantity and otherwise and is sold subject to all chief, quit, and other rents and outgoings and to all incidents of tenure, rights of way, and other rights and easements (if any) affecting the same and if any error, misstatement, or omission (not of a serious or vital nature nor considerably affecting the value of the property) shall be discovered in the Particulars Special Conditions or Contract the same shall not annul the sale nor shall any compensation be allowed by or to either party in respect thereof.

Incidentally this condition is identical to condition 11 of the Singapore Law Society's Conditions of Sale 1981.

By a notice in writing dated 7 August 1987 addressed to the plaintiffs' solicitors, the defendants' solicitors called on the plaintiffs to complete the purchase of No 62 Jalan Lateh, Braddell Park, as the flat was now known, by paying the sum of $61,732 which was the full balance of the purchase price outstanding, within 14 days of the receipt of the notice, failing which, it was said, interest at the rate of 12% was chargeable. The notice was received by the plaintiffs' solicitors on 8 August 1987. The notice also called for an additional payment of $1,179.71 being as to $759.71 government resurvey fee and as to $420 maintenance fee for July to September 1987. Enclosed with the notice were photocopies of the duplicate subsidiary strata certificate of title Volume 274 Folio 102, the defendants' architect's certificate referred to in cl 14(1) of the agreement and the defendants' surveyor's certificate.

Quite obviously this notice was intended to be the 'notice to complete' referred to in cl 14(2) of the agreement which was required to be given to the plaintiffs or their solicitors on or before 31 December 1986 or within any extension of time given by the Controller of Housing which extension shall not in any case exceed six months.

The plaintiffs' solicitors' response to the defendants' solicitors' 'notice to complete' was given on 13 August 1987. It was twofold. First, it was stated that since notice to complete was given after 31 December 1986 liquidated damages was payable vide cl 14(2) of the agreement for the period 1 January 1987 to 8 August 1987 on 80% of the purchase price at 9% pa. This was calculated at $13,394.99 which the plaintiffs' solicitors stated would be deducted from the balance of the balance price on completion. Secondly, the plaintiffs' solicitors pointed out that the area of the flat shown in the duplicate subsidiary strata certificate of title Vol 274

Folio 102 was 6 square metres or 4.8% less than the area of the flat as stated in the agreement. Accordingly they claimed an abatement or deduction of $14,815.68 from the balance of the purchase price.

There then followed three letters from the defendants' solicitors to the plaintiffs' solicitors. The first dated 15 August 1987 that they were taking their clients' instructions on the quantum of the liquidated damages and shortfall in area. The second, dated 21 August 1987, received by the plaintiffs' solicitors on 22 August 1987, the day of completion if the defendants' solicitors' notice in writing dated 7 August 1987 was a valid notice under cl 14(2) of the agreement, stated that the area in the agreement was an estimated area and that there was no provision in the agreement for a reduction of the purchase price for the alleged shortfall in area. This letter concluded with the defendants' solicitors calling on the plaintiffs to complete and make payment within the time stipulated in their solicitors' notice dated 7 August 1987. The third also dated 21 August 1987 informed the plaintiffs' solicitors that the defendants had applied to the Controller of Housing for extension of time to give a notice to complete and that they would let the plaintiffs' solicitors know the result in due course.

It must be noted that no evidence was given to the court by the defendants as to when they had applied to the Controller of Housing for an extension of time to give a notice to complete and if such an application had in fact been made what the result was. Furthermore, on the evidence before the court, the first and only intimation made by the defendants to the plaintiffs that such an application had been made was the defendants' solicitors' letter to the plaintiffs' solicitors dated 21 August 1987 and be it noted that this was well beyond the date of 31 December 1986 specified in cl 14(2) of the agreement and the maximum extension of six months therein provided.

The irresistible inference is that no application had been made by the defendants to the Controller of Housing for an extension of time to give a notice to complete before 31 December 1986 or at all.

The plaintiffs did not complete. It appears that there were discussions which came to nothing. Neither party made any move to complete the sale and the matter laid dormant for nearly two years.

In August 1989 the plaintiffs concluded an agreement to sell the flat to one Chia Ka Man for $330,000. The date of completion was fixed for 24 November 1989. In order to complete the sale the plaintiffs inquired of the defendants on 14 September 1989 whether they were agreeable to execute a tripartite transfer in favour of the new purchaser. On 9 October the defendants' solicitors replied to say that the defendants had no objections to executing a tripartite transfer in favour of the plaintiffs' sub-purchaser provided the plaintiffs paid the defendants interest for late completion. A new dimension had now arisen. There then followed an exchange of correspondence between the plaintiffs' solicitors and the defendants' solicitors in which the plaintiffs' solicitors complained that up to date, that is to say, up to November 1989 the defendants' solicitors had made no response on the question of the shortfall in the area of the flat and put the defendants' solicitors on notice that they would hold the defendants liable for any damages interest or loss they might suffer in not being able to complete with their sub-purchaser caused by the defendants' failure to complete with the plaintiffs.

The plaintiffs' solicitors further stated that their clients were ready to complete provided the defendants granted a full abatement on the difference in the contracted area and that in the subsidiary strata certificate of title. They also stated that the defendants were not entitled to ask as a pre-condition to the tripartite transfer that the plaintiffs accept a smaller rebate or to claim interest from the plaintiffs for late completion as a proper completion account had yet to be rendered and in fact no proper notice to complete had been given to the plaintiffs. The defendants' solicitors simply said that their clients were not liable to pay any damages, interest or loss suffered by the plaintiffs with regard to their subsale. It was a matter between the plaintiffs and their sub-purchaser. The defendants did not agree that they were not entitled to interest for late completion or that no proper completion account had been rendered and no proper notice to complete given.

On 25 November 1989 the defendants took a precipitate step. Their solicitors' letter to the plaintiffs' solicitors reads as follows:

> Re: No 62 Jalan Lateh
>
> We refer to your letter of 21 November 1989.
>
> There is delay on your clients' part to complete. They are in breach.
>
> As stated, our clients require completion, without any condition.
>
> Our clients will not accept the completion, subject to any condition.
>
> We refer to the statement of account set out in our letter of 7 August 1987. The amount payable for completion is correctly computed.
>
> The sum of $13,394.99, agreed as liquidated damages, can be deducted from the amount payable on the date of completion.
>
> The amount of interest is correctly calculated. It must be added to the amount payable on the date of completion and the sum must be paid to our clients by your clients. The sum is calculated at 12% on the sum of $61,732 from 23 August 1987 to the date of completion.

Our clients require immediate completion.

Alternatively, your clients must elect whether they wish to rescind the contract. Our clients propose to resell the property at a higher price.

Kindly let us know whether they wish to rescind the contract, urgently.

Please complete within three days from this date, without condition.

The shortfall is of such nature which does not give your clients any reliefs. The value of the property is higher than the sale price. The present market price of the property is higher than the sale price.

After the three days, our clients will treat your clients' failure to complete as a breach of contract, or putting an end to the contract.

This letter was followed by another letter dated 27 November 1989 in which the defendants' solicitors repeated that the completion date was 22 August 1987 and that the plaintiffs were in breach of the agreement and that they had put the agreement to an end. The amount of interest to date was stated to be $16,784.334 and the daily interest, $20.30 ($16,824.94 up to 29 November 1989).

The plaintiffs' solicitors by their letter dated 28 November 1989 disputed the whole of the defendants' solicitors' letter of 25 November 1989 and in conclusion said 'In relation to the sub-sale, we would also like to put on record that with a view to mitigate damages, our clients have offered to complete the matter without prejudice to their right to claim for the shortfall of area and to object to the interest imposed by your clients for late completion which your clients have declined.'

It should be noted that notwithstanding the defendants' solicitors' letter to the plaintiffs' solicitors dated 25 November 1989 the defendants did not act under cl 5(3) of the agreement to repudiate the agreement. Neither did the plaintiffs seek to rescind the agreement on account of the shortfall in area for which the defendants had refused compensation by way of an abatement of the purchase price.

This then was the position when the plaintiffs commenced these proceedings on 29 November 1989. They claimed the following declarations:

(i) That the defendants are in breach of the sale and purchase agreement dated 11 September 1981 in tendering to the plaintiffs the subsidiary strata certificate of title showing a floor area of 119 square metres instead of 125 square metres as set out in the said agreement and the plaintiffs are not obliged to complete the sale unless the defendants give the plaintiffs an abatement of the purchase price amounting to $14,815.68 being the compensation for the total deficit in floor area which sum shall be deducted from the balance of the purchase price.

(ii) Alternatively that the plaintiffs are only obliged to complete the sale after the defendants have given an abatement on the purchase price amounting to $14,815.68 being the compensation for the total deficit in floor area which sum shall be deducted from the balance of the purchase price.

(iii) That the defendants have failed to give a proper notice to complete and completion account and are hence not entitled to charge any interest for late completion since the original notice to complete dated 7 August 1987 and the completion account set out therein was a notice asking for the original purchase price without any abatement and/or take into account the liquidated damages that the defendants are liable to the plaintiffs.

(iv) That since the defendants to date have failed to give a proper notice to complete and completion account, the defendants are liable to the plaintiffs for liquidated damages for late completion from the contracted date of completion, ie 31 December 1986 till the date of actual completion or date when a proper notice to complete and completion account have been given.

(v) That the defendants pay to the plaintiffs such further amount to be assessed or computed as being interests for late completion, damages or otherwise any loss which the plaintiffs has to pay their sub-purchaser due to the delay and/or refusal of the defendants in failing to complete the original purchase including costs on a solicitor and client basis.

With the leave of the court they added a further prayer as follows:

(vi) Further and/or alternatively that the defendants do complete the sale and purchase agreement dated 11 September 1981 after giving the plaintiffs:

(1) an abatement in the price amounting to $14,815.68 being compensation for the deficit of the floor area such sum to be deducted from the balance of the purchase moneys;

(2) a further abatement in the purchase price in a sum to be assessed being reimbursement of the interest incurred alternatively lost by the plaintiffs on the proportionate amounts paid by the plaintiffs or otherwise paid as instalments towards the original purchase price prior to the abatement of price;

(3) deductions therefrom such sums assessed as damages under prayer (v) herein.

On 5 December 1989 the plaintiffs had obtained an ex parte interim injunction restraining the defendants from

selling, offering for sale, transferring, assigning or otherwise disposing the flat until after the trial of this action or until further order. This ex parte interim injunction was still in force when I heard this originating summons.

The defendants for their part had taken out an application on 4 December 1989 that the originating summons be set aside on the grounds generally that the originating summons procedure was inappropriate. This application was adjourned to be heard with the originating summons.

At the hearing the defendants' counsel agreed with my suggestion that his objections to the procedure could be rectified by deleting the words in the title to the originating summons which read 'In the matter of the Housing Developers (Control and Licensing) Act (Cap 250) 1970 Edition' and substituting therefor 'In the Matter of Section 4 of the Conveyancing and Law of Property Act (Cap 268)'. This was duly done and the defendants' application to set aside the originating summons was not proceeded with.

It should be noted, for completeness, that in view of the expected delay in getting the originating summons heard the plaintiffs' solicitors suggested to the defendants' solicitors by letter dated 28 February 1990 that the plaintiffs would be prepared to and offered to complete the transaction on 7 March 1990 by payment through a cashier's order of $67,170.77 without prejudice to the plaintiffs pursuing their right as claimed under the originating summons.

The sum of $67,170.77 was arrived at as follows:

Balance of purchase price claimed by defendants (not admitted by plaintiffs)	$61,732.00
Interest from 22 August 1987 to 7 March 1990 (928 days) (not admitted by plaintiffs)	$18,833.76
	$80,565.76
Less liquidated damages agreed from 1 January 1987 to 8 August 1987 vide defendants' solicitors' letter dated 5 February 1988 (not before the court)	$13,394.99
	$67,170.77

In exchange all that the plaintiffs wanted was the tripartite transfer executed. The engrossed tripartite transfer was enclosed.

The defendants rejected this offer out of hand contending by their solicitors' letters of 2 and 6 March 1990 that there had been no tender of payment before or on completion (meaning the completion date of 22 August 1987) or before the commencement of the originating summons and that it was too late now for the plaintiffs to tender payment, except without conditions. They further contended that they did not agree to the tripartite transfer and stated quite wrongly that they were not aware of the agreed sale which they only knew of after the commencement of these proceedings. It will be remembered that as long ago as 9 October 1989 the defendants' solicitors had agreed to execute a tripartite transfer in favour of the plaintiffs' sub-purchaser provided the plaintiffs paid interest for late completion.

I have set out the facts in some detail as this case falls to be decided on the facts mainly.

I have already found that on the evidence before me that the last date for giving a notice to complete was 31 December 1986 as stated in cl 14(2) of the agreement. A notice to complete is necessary by the terms of cl 14(1) of the agreement as by that notice and the documents which are to accompany it, the vendor (the defendants) demonstrates his ability to make and execute to the purchaser (the plaintiffs) the assurance of the property sold. In this case the defendants' solicitors' letter dated 7 August 1987 had enclosed with it photocopies of the duplicate subsidiary strata certificate of title of the flat (Vol 274 Folio 102), the defendants' architect's certificate in accordance with cl 14(1) of the agreement and the defendants' surveyor's certificate. That notice too called on the plaintiffs to complete the matter within 14 days of the receipt of the notice to complete as required by cl 14(1) of the agreement. The notice having been received by the plaintiffs' solicitors on 8 August 1987 the date of completion, provided the notice was a valid notice under cl 14(2) of the agreement, would be 22 August 1987.

The plaintiffs' counsel has argued that the notice was not a valid or proper notice under cl 14(2) of the agreement since the completion account it contained was erroneous in that it did not take into consideration the liquidated damages payable by the defendants as provided by cl 14(2). There is no requirement in cl 14 that the notice to complete must or should contain a completion account. Neither is there, as stated by Chan Sek Keong JC (as he then was) in *Toh Teck Sun* v *Mandarin Gardens Pte Ltd*,[1] a fundamental conveyancing practice of a purchaser's entitlement to one as of right.

There can be no doubt that the plaintiffs were entitled to liquidated damages under cl 14(2). In my view it was a simple matter of arithmetic to calculate the amount of liquidated damages payable by the defendants. In fact the amount of $13,394.99 claimed by the plaintiffs as early as 13 August 1987 was not challenged or disputed by the defendants' solicitors.

There was no reason why the plaintiffs could not have completed the transaction on 22 August 1987 by deducting the sum of $13,394.99 from the amount claimed by the defendants by their solicitors' letter dated 7 August 1987 (the notice to complete) as they were entitled to do by cl 14(2). This would have been the proper thing for the plaintiffs to do for it is as much their obligation under the agreement to pay the balance of the purchase price due on the completion date as it is the defendants' obligation to make and execute an assurance of the property sold.

Had the plaintiffs done this and the defendants failed to make and execute an assurance it is they who would have been in breach.

However there was the question of the shortfall in the area of the flat contracted to be sold to the plaintiffs and the plaintiffs' refusal to complete unless the defendants compensated the plaintiffs for the shortfall in area. The defendants refused to compensate taking the view that the shortfall was not of a serious or vital nature nor considerably affecting the value of the property. Since neither would give in there was an unresolved issue.

What should the plaintiffs have done in this situation? In my view they should have completed with the qualification of their entitlement to compensation for the shortfall in area and pursued it by action or have taken the summary procedure of an application under s 4 of the Conveyancing and Law of Property Act (Cap 61, 1985 Ed) before the completion date to have this question determined or have rescinded the agreement. They did not do any of them. Instead they entered into a protracted and fruitless negotiation and only when they were faced with a claim for damages from their sub-purchaser did they seek to resolve the question of the shortfall in area some two years later. By this time they were faced with a claim for interest for late completion.

On the question of whether or not the defendants' solicitors' letter dated 7 August 1987 (the notice to complete) was a proper and valid notice to complete under cl 14(2) of the agreement I have come to the conclusion that it was a proper and valid notice to complete. Accordingly the plaintiffs by failing to complete the transaction on 22 August 1987 with or without the qualification of their entitlement to compensation for the shortfall in the area of the flat but deducting from the balance of the purchase price the sum of $13,394.99 due to them by way of liquidated damages under cl 14(2) were in breach of the agreement. It follows that the defendants would be entitled to interest at the rate specified in the agreement on the amount I find due and payable to the defendants, depending on whether or not I find that the plaintiffs are entitled to the abatement they claim for the shortfall in the area of the flat, from 23 August 1987 to the date of completion or such other date as the justice of the case demands.

Whether or not a shortfall in area is unsubstantial or whether it is substantial giving rise to an abatement of the purchase price by way of compensation is a question of fact. It has been fully considered by Lai Kew Chai J in *Yeo Brothers Co (Pte) Ltd* v *Atlas Properties (Pte) Ltd*[2] and by Chan Sek Keong J in *Toh Teck Sun* v *Mandarin Gardens Pte Ltd*[1] and *Chong Ah Kwee & Anor* v *Viva Realty Pte Ltd.*[3] The line of reasoning initiated by Lai Kew Chai J and further developed by Chan Sek Keong J I respectfully approve and adopt. No rule of thumb can be applied to determine whether a shortfall in area is substantial or unsubstantial. Each case must depend on its facts. In any event a shortfall in area calculated on a unit ratio and which produces a difference of $14,815.68 is not an inconsiderable sum of money to the average flat dweller.

I would therefore hold that the plaintiffs are entitled to an abatement of the purchase price in the sum of $14,815.68.

The defendants in not bringing this matter to an early resolution by negotiation may have been morally unreasonable. Legally they were entitled to take the position they did. The breach and the fault as I have found falls on the plaintiffs. It follows that the amount payable by the plaintiffs to have completed the transaction on 22 August 1987 was not the sum of of $61,732 as claimed by the defendants but the sum of $33,521.33

I have already held that the defendants are entitled to interest for late completion at the rate specified in the agreement. The question is whether such interest should be paid to the date of actual completion. I find that the offer made by the plaintiffs through their solicitors' letter dated 28 February 1990 to complete on the 7 March 1990 by paying what in effect the defendants were claiming whilst reserving their position to have the question of the shortfall in area tried by this originating summons a genuine attempt on the part of the plaintiffs to mitigate their damage, albeit so late in the day. The defendants' counsel's argument that there was no tender in fact, I find specious. The plaintiffs offered to pay the sum by a cashier's order. In the circumstances of this case a tender in the technical legal sense was not necessary. The only question was whether the offer to complete was genuine. I have no doubt it was.

The justice of the case demands that the defendants should not benefit by their unreasonable rejection of a genuine attempt to mitigate. Interest for late completion should not be paid by the plaintiffs beyond 7 March 1990.

Accordingly I direct that the plaintiffs complete the purchase of the flat by paying the defendants the sum of

$33,521.33 together with interest thereon at the rate of 12% pa from 23 August 1987 to 7 March 1990, in exchange for a tripartite transfer executed by the defendants in favour of the plaintiffs' sub-purchaser Chia Ka Man. I further direct that the time limited for completion of the transaction by the plaintiffs be 30 days from the date of this judgment, time being of the essence, and that the ex parte interim injunction dated 5 December 1986 remains in force until such date after which it shall be deemed dissolved.

The plaintiffs are not entitled to any of the other declarations or orders they have claimed by the originating summons herein. In particular the plaintiffs are not entitled to interests for late completion, damages or otherwise any loss which the plaintiffs may have to pay their sub-purchaser Chia Ka Man due to the delay and/or refusal of the defendants in failing to complete the original purchase. The inability of the plaintiffs to convey the flat to their sub-purchaser Chia Ka Man is entirely due to the plaintiffs' breach of the agreement and not the defendants'.

In the premises of my findings I would conceive there should be no order for costs. I am however prepared to hear counsel. After hearing arguments I award the plaintiffs one-third of the taxed costs in these proceedings.

Order accordingly.

Solicitors: *Keh Kee Guan & Co; Yap & Yap.*

Reported by *Teoh Ai Lin*

MALAYSIAN REPORTS

Goh Ah Bah v Timbalan Menteri Dalam Negeri & Anor and other appeals

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NOS 44-17-90, 42-20-90, 44-110-90 AND 44-47-89
ABDUL HAMID OMAR LP, HASHIM YEOP A SANI CJ (MALAYA) AND MOHAMED AZMI SCJ
13 FEBRUARY 1991

Preventive Detention — Fresh detention order — Validity of — Detention orders made against appellants — Orders extended — Extension orders later revoked under s 11B(1) of Dangerous Drugs (Special Preventive Measures) Act 1985 — Fresh detention orders made under s 6(1) in substitution — Whether fresh detention order can replace an extension order — Effect of amendment to s 6A — Dangerous Drugs (Special Preventive Measures) Act 1985, ss 6(1) & 11B — Dangerous Drugs (Special Preventive Measures) (Amendment) Act 1990

One of the appellants in these appeals, Goh Ah Bah, was originally detained under a detention order made by the Deputy Minister for Home Affairs under s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act') for a period of two years with effect from 18 May 1987. On 29 April the Deputy Minister made another order extending the detention of the appellant under s 11(1)(a)(aa) of the Act and directed the detention of the appellant for a period of two years with effect from 17 May 1989. On 3 April 1990, the Deputy Minister revoked the extension order made on 29 April 1989 and on the same date he also made a detention order under s 6(1) of the Act. This order directed the detention of the appellant for a period of 13 months. The issue common to all the appeals is the question of the power of the minister conferred by s 11B of the Act and whether or to what extent the power is affected by the Dangerous Drugs (Special Preventive Measures) (Amendments) Act 1990. The Judicial Commissioner had held that s 11B(2) of the Act did not require as a condition that a fresh order or direction must be of the same type as the one that is revoked. In a number of other cases decisions had been given contrary to the view expressed by the learned Judicial Commissioner. The appellants appealed.

Held, allowing the appeals:

(1) Section 11B(2) of the Act preserves the minister's power to make the order or direction as specifically mentioned in that section. The minister may make a fresh detention order or a fresh restriction order or a fresh direction under s 6(1) and (3) and s 11A(1) respectively of the Act in place of the order or direction revoked. The power is specific and distinct for each type of order or direction.

(2) A fresh detention order, therefore, may be made only to replace a detention order which is revoked and a fresh restriction order or direction may be made only to replace a restriction order or direction revoked. In other words, a fresh direction can be issued only to replace an existing direction which has been revoked.

(3) The new sub-s (2) of s 6A inserted by the Dangerous Drugs (Special Preventive Measures) (Amendment) Act 1990 did not alter the law except in respect of the validity of the detention order or restriction in the absence of the reports. The distinction between a detention order and a restriction order still remains intact.